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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

VICTOR G. GRAHN; JAMES L. COOPER, JR.; RICHARD DANIEL GALLAGHER; COURTNEY B.L. EDWARDS; RONALD WAYNE DABE, ...PETITIONERS

versus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, LOCAL 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO; UNITED PARCEL SERVICE CO.; INDEPENDENT PILOTS ASSOCIATION, ...RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE LANGUAGE OF THE RAILWAY LABOR ACT AT 45 U.S.C. § 152 SEVENTH AND 45 U.S.C. § 156 PROHIBITS DEFENDANTS FROM CHANGING THE RATES OF PAY, RULES, OR WORKING CONDITIONS OF THE PLAINTIFFS CONTRARY TO AND IN VIOLATION OF THE TERMS OF THE EXISTING COLLECTIVE BARGAINING AGREEMENT, AND CONTRARY TO, AND IN VIOLATION OF THE RAILWAY LABOR ACT, AND IF SO, WHETHER THE DECISION OF THE DISTRICT COURT ENTERING SUMMARY JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT AGAINST DEFENDANT UNIONS FOR BREACH OF DUTY OF FAIR REPRESENTATION, AND AGAINST DEFENDANT UPS FOR BREACH OF THE COLLECTIVE BARGAINING AGREEMENT WAS ARBITRARY AND IN ERROR AS A MATTER OF LAW.

II. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE COMPANY AND UNION REPRESENTATIVES WERE AUTHORIZED TO CREATE A SIDE AGREEMENT PURPORTING TO INTERPRET A PROVISION OF THE SUPPLEMENTAL AGREEMENT RESOLVED PREVIOUSLY BY A SYSTEM BOARD OF ADJUSTMENT RULING, WITHOUT ADDRESSING THE ISSUE OF WHETHER THE PROCEDURES ENGAGED IN TO EFFECT SUCH CHANGES AND AMENDMENTS ULTIMATELY DID OR DID NOT ABIDE BY THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, THE PROVISIONS OF THE RAILWAY LABOR ACT, AND A UNION'S DUTY OF FAIR REPRESENTATION.

III. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS FAILED TO APPLY THE CORRECT STANDARD IN REVIEWING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

PARTIES

The Petitioners in this Court are Victor G. Grahn, James L. Cooper, Jr., Richard Daniel Gallagher, Courtney B.L. Edwards, Ronald Wayne Dabe, who were the Plaintiffs-Appellants below.

The Respondents in this Court, who were the Defendants-Appellees below, are International Brotherhood of Teamsters Airline Division, Local 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; United Parcel Service Co.; Independent Pilots Association.

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2. Victor G. Grahn; James L. Cooper, Jr.; Richard Daniel Gallagher; Courtney B.L. Edwards; Ronald Wayne Dabe v. International Brotherhood of Teamsters Airline Division, Local 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; United Parcel Service Co.; Independent Pilots Association, No. 92-5286 (6th Cir. 1992).

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IN THE

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October Term, 1992

VICTOR G. GRAHN; JAMES L. COOPER, JR.; RICHARD DANIEL GALLAGHER; COURTNEY B.L. EDWARDS; RONALD WAYNE DABE .....PETITIONERS

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, LOCAL 608, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, AFL-CIO; UNITED PARCEL SERVICE CO.; INDEPENDENT PILOTS ASSOCIATION..... RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTION

The United States Court of Appeals issued its opinion on January 5, 1993, affirming the decision of the United States

District Court. District Court jurisdiction was based on 28 U.S.C. § 1331.

The jurisdiction of this Court to review this Petition for Writ of Certiorari is invoked under Title 28, United States Code, Sections 1254(1) and 2101(c), and Supreme Court Rules 13 and 14.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

This case involves the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA"), which provides at § 152, Seventh:

> Seventh. **Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden.** No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [45 USCS § 156].

Which provides at § 156:

> **Procedure in changing rates of pay, rules, and working conditions.** Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said board has proffered its services, rates of pay, rules, or working

> conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act [45 USCS § 155], by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

This case also involves Fed.R.Civ.P. 56 which holds at paragraphs (c) and (e) that if the adverse parties' response, by affidavits or as otherwise provided in this rule (pleadings, depositions, answers to interrogatories, and admissions on file) sets forth specific facts showing that there is a genuine issue as to any material fact, summary judgment is not appropriate. (Appendix 22a)

STATEMENT OF THE CASE

Plaintiffs are employees as defined in 45 U.S.C. § 151 Fifth and seek injunctive relief, damages, declaratory judgment and other appropriate relief pursuant to the Railway Labor Act, 45 U.S.C. § 151 et seq.

Plaintiffs' underlying Complaint arises out of the Teamsters Union's[1] breach of its duty of fair representation and the company's breach of the collective bargaining agreement. Defendants have changed the working conditions of the Plaintiffs and have changed the language of the collective bargaining agreement depriving Plaintiffs of their rightful seniority status. Plaintiffs allege this was effected in violation of the terms of the collective bargaining agreement, in violation of the provisions of the RLA, and in breach of the unions' duty of fair representation regarding contract changes.

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[1] "Teamsters Union" when used, will refer to Teamsters International, and Teamsters Local 608, collectively.

Plaintiffs are employed as flight crewmembers by Defendant United Parcel Service Co. (UPS Co.) a wholly owned subsidiary of United Parcel Service of America, Inc. (UPS America), a holding and management company. UPS Co. is a carrier within the meaning of the RLA 45 U.S.C. § 151, First.

Until August 24, 1987, when UPS[2] announced its decision to assume operational control of its aircraft, UPS contracted with four contract carriers to provide air crews and maintenance crews for the planes owned by the company and leased to the contract carriers.

Teamsters International, in conjunction with its affiliate, Local 608, acted as representative for the flight crewmembers in negotiating a Collective Bargaining Agreement between the flight crewmembers and the company.[3] Also negotiated at this time, and incorporated in Article 4 of the Supplemental Agreement, was the "Transition Letter of Agreement" to cover, among other issues, special seniority issues during the transition period.[4]

The Transition Letter of Agreement was negotiated to "provide the addition of complete crews to the Crewmembers Seniority List in an orderly manner during the return of aircraft to the Company from contractors."

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[2]"UPS" when used, will refer to UPS America and its wholly owned subsidiaries.

[3]This contract is entitled "Flight Crewmember Supplemental Agreement to the National Master UPS Collective Bargaining Agreement."

[4]The "transition period" refers to the period from August 1987, when UPS first began hiring flight crewmembers, through calendar year 1988.

The Transition Letter of Agreement assures that employees hired from the four contract carriers[5] during the transition period be given a preferential seniority status designated Group I.[6] Paragraph A of the Transition Letter of Agreement states that:

> Group I shall be former Company contractor crewmembers who were flying for a Company contractor on or after September 1, 1987, and also crewmembers who are acquired as a result of a merger with, or acquisition of, another carrier.

The seniority position of Group I flight crewmembers relative to each other is also defined in paragraph A of the Transition Letter of Agreement, as follows:

> Group I crewmembers will be hired in position by status and aircraft type. Group I contractor crewmembers will be positioned on the administrative list by those hired September 1, 1987 and earlier, arranged by date of birth followed by those hired after September 1, 1987, arranged by date of birth.

As defined by the terms and conditions of the Transition Letter of Agreement, each of the Plaintiffs are Group I employees hired by a contract carrier prior to September 1, 1987.

UPS hired its first crewmembers on January 18, 1988. The first seniority list was developed and published in January, 1989, after the transition period had been completed. A thirty-day

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[5]The four contract carriers referred to in the Transition Letter of Agreement are: Evergreen Airlines, Inc.; Interstate Airlines, Inc.; Orion Air; and, Ryan Aviation/PHH Air.

[6]Group II crewmembers are employees hired from sources other than the four contract carriers, and this category is not an issue in the present action.

period was allowed for employees to review and object to the seniority list. According to a memo from William Ferchak, who became Trustee of Teamsters Local 608 in late 1988[7], some eighteen grievances were filed within the thirty-day period alleging violations of Article 4 (Seniority) of the Collective Bargaining Agreement and alleging violations (Seniority) of the Transition Letter of Agreement.

Although Plaintiffs were former contract flight crewmembers with Orion Air, hired and flying for the contract carrier before September 1, 1987, they were incorrectly positioned on the seniority list with those employees hired by the contract carriers after September 1, 1987.

Article 17 of the flight crewmembers Supplemental Agreement states that:

> In compliance with Section 204, Title II of the Railway Labor Act, as amended, is hereby established a System Board of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of this Agreement and any amendment or additions thereto and which are properly submitted to it, which Board shall be known as "United Parcel Service Crewmembers System Board of Adjustment", herein referred to as the "Board."

Pursuant to the terms of the contract, a System Adjustment Board hearing was held in Louisville, Kentucky, in February, 1989 to hear the above-referenced grievances. The 4-0 decision of the February System Adjustment Board interpreted the contract language regarding seniority to mean that:

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[7]Dan Darrow, a Teamster International employee was Trustee prior to Ferchak.

> All crewmembers hired by the Company in 1988 who were previously working for a company contractor and who were hired by the contractor prior to September 1, 1987, regardless of the date of IOE completion, shall be placed in Group I; followed by all crewmembers hired by the Company in 1988 who were previously working for a company contractor and who were hired by the contractor on or after September 1, 1987. There shall be no retroactive compensation.

A UPS crewmember revised seniority list was issued subsequent to the Board decision reflecting Plaintiffs' correct seniority position in Group I, which positions them before those contract crewmembers hired by the contract carriers after September 1, 1987.

Article 17 of the flight crewmembers Supplemental Agreement clearly states that:

> The Board shall have jurisdiction over all disputes growing out of grievances or out of the interpretation or application of any of the terms of this Agreement...The Board shall be competent to hear the disputes properly submitted to it and decide said disputes by a majority vote of all members of the Board. Decision of the Board shall be final and binding upon the parties hereto. (Emphasis added)

The February decision of the System Adjustment Board was grieved by employees alleging their seniority was affected by the Board's decision. Although the Board was bound by the terms of the CBA to deny these grievances as without merit, since the February Board decision which interpreted the contract language regarding seniority was final and binding on all parties, a special unannounced June System Board was called by William Ferchak,

Teamster Trustee of Local 608, and by Neil Konietzko, Air Region Labor Relations Manager for UPS, to specifically hear those grievances.[8] After hearing the grievances of those whose seniority was allegedly negatively affected by the February Board decision, the June System Board issued a communication dated June 21, 1989, stating that:

> **This case is referred back to a joint company-union committee for resolution.**

On August 2, 1989, without affording Plaintiffs any hearing, or opportunity to be heard, the company and the union issued an "Agreement" signed by William Ferchak and Neil Konietzko attempting to add new contract terms, and language altering the Collective Bargaining Agreement. As the result of this invalid decision, Plaintiffs were demoted to a new seniority classification arbitrarily entitled "Group I-A," a classification not authorized by the contract or the Transition Letter of Agreement. UPS issued a revised crewmember seniority list on August 2, 1989, simultaneous with the so called "August Agreement", reflecting this confusing, improper and invalid decision.

Subsequent to the "August Agreement", Plaintiffs filed grievances requesting that the Collective Bargaining Agreement/Transition Letter of Agreement, as interpreted by the February System Board, be adhered to and that the arbitrary and invalid "August Agreement" be voided. Plaintiff Grahn's grievance was denied by the company with the curt statement that there was "no contract violation." The union's response to Grahn's grievance was that the grievance was "settled." The union has refused Plaintiff Grahn any meaningful appeal. Further, the

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[8] Ferchak (Teamsters Local 608) and Konietzko (representing UPS) were two of the four System Board members who rendered the unanimous February Board decision which definitively interpreted the contract language regarding seniority. The other two were Lee Wallace, UPS Flight Operations Manager, and Robert Miller, union steward.

union has refused to process the grievances filed by the other Plaintiffs. Plaintiffs have thus exhausted all administrative remedies. Since the union has indicated that its decision is fixed, any administrative remedies would be futile and are not required.

The Memorandum and Order of the District Court, dated June 18, 1991, states at page 18a of the Appendix:

> The record shows that the final disposition of the grievance heard in June by the Board was not accomplished by a Board decision in the manner contemplated in Article 17(E) of the Supplemental Agreement. There is no record that the committee ever returned to the board to argue or to support its recommendation, but rather the evidence suggests that the committee submitted the recommendation directly to the union and the company.(Fnt.12) It does not appear that any formal request to negotiate such an agreement was made by either signatory or that the procedures mandated by the Railway Labor Act, Section 156 for changing collective bargaining agreements were followed in its adoption.
>
> (Fnt.12)There is no written record of the Board's consideration of the recommendation as required in Article 17(M) of the Supplemental Agreement.

The June 18, 1991, District Court Memorandum and Order further states:

> It is undisputed that the proceedings and decision of the February Board conformed with Article 16 and therefore the Board which convened in June did not have the authority to settle the dispute before it. (at 19a)

Although the District Court found that "the Board which convened in June did not have the authority to settle the dispute

before it," the Court held the motions of the parties for summary judgment in abeyance. Further, the District Court granted Defendant Local 608, or any other Defendant sixty days in which to brief and submit to the Court any memoranda or evidence regarding apparent authority as to "whether the company and union representatives were authorized to create a 'side agreement' purporting to interpret a provision of the Supplemental Agreement resolved previously by a Board ruling."

Defendants Teamsters International Union, Teamsters Local 608, and UPS, filed supplemental memoranda on August 19, 1991. Plaintiffs filed their motion for leave to respond to Defendants' supplemental memoranda, and duly filed their responses thereto.

On January 24, 1992, the Court entered its Memorandum and Order that the motion of the Plaintiffs for summary judgment against the Defendants be and is hereby denied; and further that the motion of the Defendants for summary judgment on the claims of the Plaintiffs against them be granted and Plaintiffs' claims be dismissed with prejudice. (Appendix 4a)

The District Court held that:

> The affiants attest to the local union officers' authority to negotiate binding amendments to the Flight Crewmember Supplemental Agreement to the CBA. Plaintiffs do not controvert the affidavits, but argue instead that even if the local union had authority to enter into binding side agreements, the members of the "joint company-union committee" who recommended the change in the contractual provision were "self-serving." Plaintiffs allegations' are not sufficient to withstand the defendants' motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477

U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). (Appendix 7a)

The District Court did not address, nor give weight to the pleadings, depositions, answers to interrogatories and admissions on file which clearly controverted Defendants' affidavits, which clearly showed that Plaintiffs' legal argument and the facts presented supported Plaintiffs' allegations that the union acted arbitrarily, discriminatorily, and in bad faith.

The District Court also failed to address the issue before it, that even if company and union representatives were authorized to create a side agreement purporting to interpret a provision of the Supplemental Agreement resolved previously by a System Board of Adjustment ruling, the procedures Defendants engaged in did not abide by the terms of the CBA, the provisions of the RLA, or the Union's duty of fair representation.

Plaintiffs appealed the decision of the District Court. The Sixth Circuit affirmed on January 5, 1993, holding that it found "no errors warranting reversal." (Appendix 1a)

I. THE DISTRICT COURT DECISION ENTERING SUMMARY JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT WAS ARBITRARY AND IN ERROR AS A MATTER OF LAW BECAUSE IT FAILED TO ADDRESS THE ISSUE SET FORTH IN PLAINTIFFS' COMPLAINT AND IN THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT.

The Railway Labor Act forbids changes in pay, rules or working conditions contrary to the collective bargaining agreement and contrary to 45 U.S.C. § 156. (45 U.S.C. § 152, Seventh)

Article 2, Section 1 of the Master Agreement[9] states:

> No new Supplements, Riders or Addenda to this Agreement shall be negotiated by any of the parties hereto, unless otherwise agreed to by the Employer and the National Negotiating Committee. Any Supplement, Rider or Addendum not agreed to by the National Negotiating Committee will be null and void. (Emphasis added)

The "August Agreement" changing the terms of the Transition Letter of Agreement, clearly, was not ratified nor agreed to by the National Negotiating Committee and is not only null and void, it is in violation of the CBA which does not provide for a committee, of any number, or any make-up, to negotiate a change in contract language regarding pay, rules or working conditions.

Defendant Teamsters Union has stated that the August document was not an "Agreement", but was merely an investigation of all the "evidence compiled." (Deposition of William Ferchak, pp. 66, 68-69). UPS contends that the "August Agreement" was negotiated by the company and the union. (Deposition of Lee A. Wallace, p. 140). Regardless of how it is characterized, the "August Agreement" is invalid. The Collective Bargaining Agreement does not provide for a "joint company-union committee" to unilaterally and arbitrarily create new contract language, nor does it allow for secret company-union negotiations to change contract language.

Section 156 of the RLA sets forth certain procedures in changing rates of pay, rules and working conditions. These

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[9]The Flight Crewmembers Supplemental Agreement does not address the issue of riders or addenda to the contract.

include written notice of the intended change, and agreement between the representatives of the parties interested in such change as to the time and place for conferencing as to the intended change. Defendants neither complied with the terms of the CBA, nor the provisions of the RLA. Instead, they arbitrarily, discriminatorily and in bad faith, changed Plaintiffs' working conditions with the publication of the document entitled "August Agreement."

The issue that was placed before the District Court is whether the Union breached its duty of fair representation:

a) when it reconsidered the final and binding decision of the February System Board of Adjustment which definitively interpreted the contract language regarding seniority;

b) by calling a special June System Board to hear meritless and untimely grievances regarding a System Board Decision which was final and binding on all parties;

c) by referring those "new grievances" to a "joint company-union committee" of four crewmembers for resolution;[10]

d) by approving and signing the "recommendation" of the invalid "committee" as an agreement between the Company and the Union, which

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[10] A "joint company-union committee" is not an alternative provided for in the CBA, nor can it be found in the Railway Labor Act. When the Board cannot reach a decision by majority vote, it is bound by the terms of the contract to appoint an independent arbitrator. Decisions of the Board with the arbitrator are also final and binding on the parties. CBA Supplemental, Article 17, Section E.

"Agreement" arbitrarily and discriminatorily changed Plaintiffs' working conditions.

Plaintiffs have alleged and shown, and the District Court ruled, that the Board did reconsider its decision without having the power to do so. This lower court ruling gives rise to at least a triable issue of material fact as to the arbitrariness of that decision. Nonetheless, the court below erroneously held that the real issue was, "Whether company and union representatives were authorized to create a 'side agreement' purporting to interpret a provision of the Supplemental Agreement resolved previously by a Board ruling." As Plaintiffs have argued, neither party could "reinterpret" the provision resolved by the February Board, that decision being final and binding on both parties. The only means by which the provision could be found to have another meaning was to change that provision! Defendants have admitted the language of the Transition Letter of Agreement was changed by the August Agreement. (Deposition of Neil Konietzko, p. 80)

The determination as to whether the company and union were cloaked with actual or apparent authority to change by "side agreement" the working condition provisions of the CBA, Supplement, or Transition Letter, is absolutely immaterial to the decision required of the District Court.

Even assuming, arguendo, that they were so authorized, the real question remains whether the procedure engaged in to effect those changes and amendments ultimately did or did not abide by the terms of the CBA, the provisions of the Railway Labor Act, and the unions' duty of fair representation to the Plaintiffs.

This issue, which is the basis of Plaintiffs' Complaint, was not addressed by the District Court.

II. PLAINTIFFS HAVE PRESENTED MATERIAL FACTS RAISING GENUINE ISSUES AS TO DEFENDANT TEAMSTERS UNION'S BREACH OF ITS DUTY OF FAIR REPRESENTATION.

On January 18, 1991, each of the four Defendants filed its Motion for Summary Judgment.

A. Defendant Teamsters International.

In its Memorandum in Support of Motion for Summary Judgment, Defendant Teamsters International stated at page 22 that:

> The standard by which the Union shall be judged is whether it acted "arbitrarily, discriminatorily or in bad faith." Ruzicka v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975), reh'g denied, 528 F.2d 912 (1975); Ratkosky v. United Transportation Union, 843 F.2d 869, 876 (6th Cir. 1988).

Teamsters International further stated, at page 21, that:

> The Union did not participate in the committee's deliberations nor did the Union have any input into the criteria utilized which formed the basis for the recommendation. No record evidence exists to the contrary. As a result, Plaintiffs cannot meet their burden of showing that their allegation regarding the joint committee was "arbitrarily discriminatory or self-serving." More importantly, however, the Plaintiffs fail to show a connection to the Union which can even arguably rise to the level of unlawful conduct on the Union's part.

Clearly, this is an admission of the Union's abnegation of its responsibility but it does not relieve the Union of its duty to Plaintiffs. When a union's conduct is an abdication of the representative function that violates the duty of fair representation, it constitutes an unfair labor practice under the Act. Branch 6000 v. NLRB, 595 F.2d 808, 816 (D.C. Cir. 1979).

Although Defendant Union erroneously states at page 18, that neither the System Board of Adjustment nor the arbitrarily established joint "committee" "owe the Plaintiffs a duty of fair representation within the meaning of the Railway Labor Act as interpreted,"

> The union has responsibility as exclusive bargaining agent to formulate the employees' position on terms and conditions of employment. This responsibility may be delegated by the union membership...However, the delegatee, once selected, must in turn function as a representative for all the employees in the bargaining unit. If a representative's negotiating decisions are motivated solely by self-interest, then there is a breach of the duty of fair representation. The same result attains when the decisionmaking function is delegated to a group of employees with the understanding that their actions will be motivated solely by their own personal considerations. Id at 811-812.

Defendant Teamsters International concluded that "absent any showing...that the Union here acted on the basis of arbitrary factors such as race, personal animosity or sheer numbers of employees in a given group, it cannot be found to have breached its duty of fair representation." (At pages 26 and 27).

However, Plaintiffs have shown that precisely because of such political pressure from another, larger group of flight

crewmembers, the Union called a special June System Board of Adjustment meeting to hear these new grievances, referred the grievances to a special committee of four crewmembers, and accepted the "recommendation" of this committee of four crewmembers as the Union's own "negotiation" with the company regarding the issue of seniority. The rule announced in Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967), that a union breaches its duty of fair representation if its actions are either arbitrary, discriminatory, or in bad faith, applies to all union activity, including contract negotiation. By its conduct, the union clearly breached its duty to Plaintiffs, and violated the standards as set out in the 6th Circuit decisions in Ruzicka, and Ratkosky and the Supreme Court decision in Vaca v. Sipes, 386 U.S. 171 (1967).

B. Defendant Teamsters Local 608.

In its Memorandum in Support of Motion for Summary Judgment, Defendant Teamsters Local 608 stated at page 19 that:

> It is well established that a claim of unfair representation requires a showing of bad faith, discrimination, or arbitrary conduct on the part of the Union. Ratkosky v. United Transportation Union, 843 F.2d 869, 876 (6th Cir. 1988), citing Vaca v. Sipes, 386 U.S. 171 (1967).

At page 24 of its Memorandum, Defendant Teamsters Local 608 stated that:

> After the February-March system board issued its decision, over 150 pilots signed a petition protesting the decision which was presented to the Union.

At page 25 of its Memorandum, Defendant Teamsters Local 608 stated that:

> Not only did representatives of those crewmembers who grieved the March decision appear and make lengthy presentations at the June hearing, but, at the Union's invitation, two crewmembers who made major presentations at the February-March hearing appeared and reiterated their presentations at the June hearing.[11]

Admitting, at page 31 of its Memorandum, that, "Employees have 'no absolute right to have [their] grievances taken to arbitration' by their Union Representatives, Vaca v. Sipes, 386 U.S. 171, 191 (1967); see also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976)," the union, nonetheless, acquiesced to a majority group and heard the new grievances at a special June System Board of Adjustment.

Admitting at page 27 that, "the Union and UPS incorporated the Committee's recommendation into what ultimately became the August Agreement," Teamsters Local 608 went on to categorize this action by the Union as a "reasonable and logical approach to the dispute." Nothing can be more unreasonable or illogical than the union's arbitrary and discriminatory conduct.

At page 26 of its Memorandum in Support of Motion for Summary Judgment, Local 608 stated that the dispute was "irreconcilable." In reality, the dispute had been reconciled by the February System Board. The Board's decision was consistent with the language of the collective bargaining agreement and was final and binding on all parties. Also, on page 26 of its Memorandum, Local 608 characterized the August 2, 1989, agreement, as a "compromise." The August agreement can hardly be considered a compromise, when all members of the "joint company union

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[11]These two union-invited crewmembers are the same two crewmembers the union appointed as "committee" members.

committee" benefitted from their "recommendation" at the expense of Plaintiffs.

The acceptance and implementation of such a biased agreement by Local 608 is clearly an arbitrary and discriminatory action made in bad faith.

C. Defendant UPS.

In its Memorandum in Support of Motion for Summary Judgment, Defendant UPS stated at page 23 that:

> The standard by which Local 608's conduct is to be measured has been set forth by the Sixth Circuit Court of Appeals in Ratkosky v. United Transportation Union, supra. In order to establish a breach of the duty of fair representation, Plaintiffs must make "a showing of bad faith, discrimination, or arbitrary conduct on the part of the union."

Defendant UPS further stated at page 25 that:

> Over one hundred and fifty crewmembers who had been moved down on the seniority lists filed a petition protesting the March 9, 1989 System Board decision as being contrary to the contract and to what they had been told when hired.
>
> Neil Konietzko and William Ferchak decided to call a special System Board of Adjustment to hear the grievances which protested the March 9, 1989 System Board decision. (Konietzko, page 31.)

D. Defendant Independent Pilots Association.

In its Memorandum in Support of Motion for Summary Judgment, Defendant Independent Pilots Association stated at pages 4 and 5 that:

> Initially, a four member System Board composed of Company and Union members agreed with this interpretation and sustained the grievances. UPS Exh. 10.
>
> The decision required reconfiguration of seniority placement and, naturally, provoked grievances from adversely affected pilots. Indeed, over one hundred grievances were filed against the System Board's decision. Grahn Dep. 68.

Although admitting that a decision of the February System Board regarding seniority would "naturally provoke grievances from adversely affected pilots," the fact that over 100 grievances were filed, is suggested by Defendant IPA to be the significant factor as to why the Union breached its duty of good faith toward Plaintiffs and arbitrarily and discriminatorily changed the contract language.

Union Trustee William Ferchak, when asked in his deposition what evidence he relied on in adopting the August Agreement, replied that he relied on the letters from the four contract negotiators[12] and the recommendations of the committee. (Ferchak deposition, pages 47-49.) Ferchak also testified at pages 43-45 of his deposition that he considered Greene's letter as improper evidence, doubted the credibility of Landsman's

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[12]The four contract negotiators were Richard Greene, Peter Landsman, Bill Reid and Bill Mann (former IPX employees, who held the first 25 seniority numbers.

testimony, and felt that Mann "at that particular time was under a lot of duress because the rank and file was getting on him for the contract and some other things that he had done, so I couldn't put too much stock into any of them, to be very truthful." Yet, in spite of this improper evidence and non-credible testimony, the Union Trustee, William Ferchak, issued the August Agreement in conjunction with the employer, UPS, which, (as admitted by the Defendant UPS) changed the contract language and the working conditions of the Plaintiffs. To allow four crewmembers, not authorized by the contract, and with self-serving interests to "weigh" the decision of the February System Board was an abdication of the Union's representative function and clearly violated the duty of fair representation. This constitutes an unfair labor practice.

Although both Plaintiffs' Complaint and the Defendants' Motions for Summary Judgment all dealt with the issue as to whether the Union breached its duty of fair representation and whether the Company breached the collective bargaining agreement, the District Court in its Memorandum and Order of June 18, 1991, granted Defendant Local 608, or any other Defendant sixty days in which to brief and submit to the Court any memoranda or evidence regarding an entirely different issue, the apparent authority as to "whether the company and union representatives were authorized to create a side agreement purporting to interpret a provision of the supplemental agreement resolved previously by a Board ruling." All Defendants responded to the invitation of the District Court. Plaintiffs filed a motion for leave to respond to the submitted memoranda.

This side issue, newly presented by the District Court, in no way supersedes the issues in Plaintiffs' Complaint and the issues before the Court; breach of duty of fair representation, breach of the CBA. However, in its Order of January 24, 1992, granting Defendants' Motion for Summary Judgment against the Plaintiffs and denying Plaintiffs' summary judgment against the Defendants, the District Court disregarded the pleadings,

depositions, answers to interrogatories, and admissions on file regarding the issues of bad faith and breach of contract. The Court held that Plaintiffs did not controvert Defendants' affidavits regarding the extraneous issue of the Union's authority to create a side agreement purporting to interpret a provision of the supplemental agreement resolved previously by a System Board of Adjustment ruling.

The District Court did not address the issue of whether the procedures the Defendants engaged to effect such changes, if indeed they were authorized to make them, did or did not abide by the terms of the collective bargaining agreement, the provisions of the Railway Labor Act, and a union's duty of fair representation.

III. THE DISTRICT COURT DID NOT ADDRESS THE ISSUE BEFORE IT BUT INSTEAD DISMISSED PLAINTIFFS' COMPLAINT BASED ON AN ISSUE IRRELEVANT TO THE CASE.

The issue before the Court was whether Defendant Union breached its duty of fair representation and whether Defendant UPS breached the collective bargaining agreement.

Clearly, the Court misunderstood or misinterpreted the issues. The Complaint alleges and the parties' Motions for Summary Judgment argue the issue of whether the Union breached its duty of fair representation and whether the company breached the collective bargaining agreement. The new "issue" presented by the District Court is irrelevant to the Complaint and to the Motions for Summary Judgment before it.

Plaintiffs maintain that even if the Union had the authority to reconsider a final and binding decision, or whether the company and the union representatives were authorized to create a side agreement purporting to interpret a provision of the supplemental agreement resolved previously by a Board ruling, the issue placed before the Court is whether the procedures engaged in by the

Defendants to effect such changes and amendments ultimately did or did not abide by the terms of the collective bargaining agreement, the provisions of the Railway Labor Act, and a union's duty of fair representation regarding contract changes.

Citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986), the District Court held that Plaintiffs' allegations are not sufficient to withstand the Defendants' motion for summary judgment. However, the Court does not identify to which allegations it refers. The allegations in the Complaint, the allegations in Plaintiffs' Motion for Summary Judgment, the allegations in Plaintiffs' Response and Objection to Defendants' Motions for Summary Judgment, or Plaintiffs' Response to Defendants' Supplemental Memoranda and Evidence regarding the issue of apparent union authority to enter into binding side agreements.

In Anderson v. Liberty Lobby, Inc., 477 U.S. at page 248, regarding the issue as to materiality, the court held that:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure, Section 2725, pp 93-95 (1983).
>
> ...More important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

In the present action, Plaintiffs allege that the Union breached its duty of fair representation and the company breached the collective bargaining agreement. Defendants filed a motion for summary judgment arguing that the Union's action was not arbitrary, discriminatory or in bad faith. As nonmoving or adverse parties, Plaintiffs responded, based on the pleadings, depositions, answers to interrogatories, and admissions on file, showing that there is indeed a genuine issue as to material fact and that the moving parties, Defendants Union and company, are not entitled to summary judgment as a matter of law.

In Anderson, the Supreme Court held that, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

The court in Anderson further stated at page 255 that:

> Our holding that the clear and convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. Adickes, 398 U.S., at 158-159, 26 L.Ed.2d 142, 90 S. Ct. 1598. Neither do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason

Co., 334 U.S. 249, 92 L.Ed. 1347, 68 S. Ct. 1031 (1948).

The Court of Appeals issued its affirming decision on January 5, 1993, stating only that, "having carefully reviewed the record and the issues presented in the appellate briefs and the arguments of counsel, we find no error warranting reversal."

In Anderson v. Liberty Lobby, Inc., a libel action brought by a public figure, Plaintiff was required under the first amendment to prove by clear and convincing evidence that the defendant acted with actual malice. The court held that:

> ...[A] court ruling on a motion for summary judgment must be guided by the New York Times "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists - that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

In the present action, Plaintiffs allege that the Defendant union breached its duty of fair representation and the Defendant employer breached the collective bargaining agreement. The evidentiary standard in determining whether a genuine issue of breach of duty and breach of contract exists is whether the union acted arbitrarily, discriminatorily, or in bad faith and whether the Company's actions were contrary to the terms of the CBA.

The District Court did not address the issue before it, but instead, ruled on an "issue" irrelevant to the case, and dismissed

Plaintiffs' Complaint based on that erroneous ruling. Plaintiffs appealed the decision of the District Court.

The issue before the Court now is whether the Court of Appeals, in affirming the District Court decision, did or did not apply the correct standard in reviewing the District Court's grant of summary judgment.

CONCLUSION

For these reasons, a Petition for a Writ of Certiorari should therefore be granted, and this Court should vacate the decision below, and remand the case for further proceedings in light of the stated issues before the District Court.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION PURSUANT TO SIXTH CIRCUIT
RULE 24

No. 92-5286

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VICTOR C. GRAHN; JAMES L. COOPER, JR.; RICHARD DANIE GALLAGHER; COURTNEY B.L. EDWARDS; and RONALD WAYNE DABE,

Plaintiffs-Appellants

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, LOCAL 608, affiliated with the International Brotherhood of Teamsters, AFL-CIO; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO; UNITED PARCEL SERVICE CO.; and INDEPENDENT PILOTS ASSOCIATION,

Defendants-Appellees

On Appeal From The United States District Court For The Western District Of Kentucky

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Decided and Filed January 5, 1993

Before: JONES and RYAN, Circuit Judges; and
PECK, Senior Circuit Judge.

PER CURIAM. Plaintiffs-Appellants are individual pilots employed by the Defendant United Parcel Service (UPS). Other Defendants are the International Brotherhood of Teamsters Airline Division, Local 608, its International, and the Independent Pilots Association, an unincorporated labor organization existing under the laws of Kentucky that has been representing UPS crewmembers since January 1990.

Plaintiffs-Appellants appeal the summary judgment granted in favor of the Defendants. They claimed in the district court that the Defendants breached a collective bargaining agreement and their duty of fair representation by entering into a written side agreement which effectively overruled a prior arbitration decision. Cross motions for summary judgment were filed.

A final order denying Plaintiffs' Motion for Summary Judgment against Defendants and granting Defendants' Motion for Summary Judgment against Plaintiffs was entered by the district court. The Plaintiffs' claims against Defendants were then dismissed with prejudice on January 24, 1992.

Having carefully reviewed the record and the issues presented in the appellate briefs and the arguments of

counsel, we find no error warranting reversal. Therefore, we **AFFIRM** the district court's decision.

Civil Action No. C 89-0983-L(B)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

VICTOR G. GRAHN, et al, - - - - - - - - Plaintiffs

v.

THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS AIRLINE DIVISION,
LOCAL 608, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN,
AND HELPERS OF AMERICA, AFL-CIO, et al,
- - - - - - Defendants

ORDER--Entered January 24, 1992

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the plaintiffs for summary judgment against the defendants be and it hereby is denied.

IT IS FURTHER ORDERED that the motion of the defendants for summary judgment on the claims of the plaintiffs against them be and it hereby is granted and the plaintiffs' claims are dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 24th day of January, 1992.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Senior Judge, U.S. District Court

Civil Action No. C 89-0983-L(B)

UNITED STATES DISTRICT COURT
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AND HELPERS OF AMERICA, AFL-CIO, et al,
- - - - - - Defendants

MEMORANDUM---Entered January 24, 1992

This matter is before the Court on cross-motions for summary judgment. Plaintiffs assert that defendants breached the collective bargaining agreement and the duty of fair representation by entering into a written side agreement regarding seniority which effectively overruled a prior "final

and binding" decision of the Systems Board, the entity charged by the CBA with arbitrating grievances.[1] We found that the Board decision was not final and binding as to subsequent agreements between the Union and the Company and ordered the parties to submit supplemental memoranda on the defendants' authority to bind the union to side agreements.

The defendants have submitted copies of side letters of agreement which involve the settlement of grievances and the alteration of the parties' contractual obligations. The defendants have also presented affidavits of Dan F. Darrow, former Director of the Parceland (sic) Small Package Trade Division and Co-Chair of the Teamsters National United Parcel Service Negotiating Committee, Al Barlow, a member of the Teamsters United Parcel Service National Negotiating Committee and Union Chair to the National Grievance Committee, William A. Ferchek (sic), Trustee of Local 608 at the times relevant to this action and a signatory to the side agreement, and Neil Konietzko, Labor Relations Manager for UPS. The affiants attest to the local union officers' authority to negotiate binding amendments to the Flight Crewmember Supplemental Agreement to the CBA. Plaintiffs do not controvert the affidavits, but argue instead that even if the local union had authority to enter into binding side agreements, the members of the "joint company-union committee" who recommended the change in the contractual provision were "self-serving." Plaintiffs allegations' (sic) are not sufficient to withstand the defendants' motion for

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[1]The facts of the case are set forth with greater specificity in the Court's Memorandum Opinion of June 18, 1991, incorporated herein by reference.

summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

An appropriate order has been entered this 24 day of January, 1992.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Senior Judge, U. S. District Court

Civil Action No. C 89-0983-L(B)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

VICTOR G. GRAHN, et al, - - - - - - - - Plaintiffs

v.

THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS AIRLINE DIVISION,
LOCAL 608, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN,
AND HELPERS OF AMERICA, AFL-CIO, et al,
- - - - - - Defendants

MEMORANDUM AND ORDER--Entered June 18, 1991

This matter is before the Court on the motions of all parties for summary judgment. Fed.R.Civ.P. 56.

Plaintiffs are employed as flight crew members by the defendant, United Parcel Service Company (UPS). Prior to

August 24, 1987, UPS contracted with four contract carriers to provide air crews and maintenance crews for aircraft leased to the contract carriers by UPS. UPS non-flight-related employees were represented by the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters International).

In 1986, UPS entered into a joint venture with DHL Airways and formed International Parcel Express (IPX). In 1987, IPX merged with UPS and 24 IPX flight crewmembers were absorbed into UPS and assigned seniority by their date of hire by UPS. The new flight crewmembers and Dan Darrow, International Brotherhood of Teamsters Airline Division, Local 608 (Local 608), negotiated a Flight Crewmember Supplemental Agreement (Supplemental Agreement) to the Teamsters International National Master Collective Bargaining Agreement (CBA).[1] The Supplemental Agreement was either to "supersede" or to add to the "corresponding articles and subsections of the [CBA]" and it stated that the provisions of the CBA "shall prevail,...[e]xcept as provided herein."

The CBA provided for grievance procedures to be set forth in "applicable Supplements...." CBA, Article 7. Article 16 of the Supplement called for resolution of grievances by informal discussions between the crewmember (grievant) and the Chief Pilot or the Chief Pilot's designee and if no solution was reached then the grievance was to be "reduced to writing and presented to the Chief Pilot or his designee." The Chief Pilot then was to issue a written

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[1]UPS flight crewmembers are now represented by the Independent Pilots Association, named as a defendant in this action.

decision. If the grievant wished to appeal the Chief Pilot's decision, he was to present the appeal in writing to the Manager of Flight, or his designee and the Manager of Flight or his designee was required to hold a hearing and announce his decision in writing. A further appeal could be made to the "United Parcel Service System Board of Adjustment" (the Board). The appeal to the Board was to be filed within thirty (30) days from "receipt by the grievant(s) of the written decision of the Manager of Flight, or his designee."

The Board was established by Article 17 of the Supplemental Agreement. It was to consist of four members, two selected by the Company and two selected by the Union. The Company and the Union were to designate an alternate to serve in the place of an absent Board member. The Board was to designate one member to act as Chairman and one member to act as Vice Chairman. The Board was to decide disputes by a majority vote of all members and the Board's decision was final and binding.

Article 17(E) provided:

> When a dispute is properly submitted to the Board for hearing...and the Board is unable to decide the dispute by majority vote, the Board shall declare itself deadlocked and it shall select an arbitrator.... The arbitrator shall join the Board as a Board Member and as Chairman thereof in the subsequent consideration and hearing of the dispute. The Board, so composed, shall be competent to decide said dispute by majority vote. Decisions of the Board so composed shall be final and binding on the parties.

In addition, Article 17(M) provided:

> The Board shall maintain a record of all matters submitted to it for its consideration and of all findings and decisions made by it.

A Transition Letter of Agreement (Transition Letter) to cover seniority issues related to UPS' hiring of all contract carriers' flight employees from January 4, 1988 to January 1, 1989 was incorporated into Article 4 of the Supplemental Agreement. The Transition Letter divided seniority into Group I and Group II as follows:

> During the transition phase ... seniority groups will be established and added to the seniority list in Article 4 ... beginning with number twenty-five (25).
>
> Seniority will be assigned to crewmembers using the following procedure:
>
> A. Group I shall be former Company contractor crewmembers who were flying for a Company contractor on or after September 1, 1987, and also crewmembers who are acquired as a result of a merger with, or acquisition of, another carrier. Group I crewmembers will be hired in position by status and aircraft type. Group I contractor crewmembers will be positioned on the administrative lists by those hired September 1, 1987 and earlier, arranged by date of birth followed by those hired after September 1, 1987, arranged by date of birth.

....

> B. Group II will be crewmembers other than those crewmembers specified in Group I above. Group II crewmembers will be hired in position by status and aircraft type.

Group I is the preferential seniority status. Plaintiffs allege that they are Group I employees, having been contract flight crewmembers with Orion Air and having been hired by and flying for Orion before September 1, 1987.

The first seniority list went into effect in January, 1989.[2] Letters of protest were written by eighteen crewmen who had been classified as Group IA.[3] Dick Green, a crewmember who had participated in the negotiation of the Transition Letter was among those protesting. (Konietzko depo. at p. 37). The grievants alleged violation of Article 4 and the Transition Letter. William Ferchak, the newly appointed trustee of Local 608, elected to treat the letters as grievances. Company official waived the grievance process and the grievances were heard for the first time before the Board in February, 1989. (Wallace depo. at p. 80). Neil Konietzko, Air Region Labor Relations Manager for UPS, Lee Wallace, UPS Flight Operations Manager, Ferchak and Robert Miller, chief steward for Local 608 were the Board members. (Wallace depo. at p. 78). The Board decided on March 9, 1989 that:

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[2]With the exception of plaintiff Edwards, plaintiffs claim they were incorrectly positioned on the seniority list

[3]Plaintiff Gallagher was the only plaintiff who grieved

> All crewmembers hired by the Company in 1988 and who were previously working for a company contractor and who were hired by the contractor prior to September 1, 1987, regardless of the date of IOE [initial operating experience] completion, shall be placed in Group I; followed by all crewmembers hired by the Company in 1988 who were previously working for a company contractor and who were hired by the contractor on or after September 1, 1987. There shall be no retroactive compensation.[4]

The Board published not only this decision, but also a summary of the evidence relied upon to reach the decision in accordance with Article 17 (M).

On March 10, 1989, a revised seniority list was posted based on the Board's decision. Plaintiffs claim that they were correctly positioned in Group I on the revised list.

Approximately 156 crewmembers whose seniority was affected adversely protested the March decision. The informal grievance procedure was waived and Ferchak and Konietzko called a Board meeting during June to hear 50 grievances. (Konietzko depo. at p. 31). The board members were Konietzko, Wallace, Ferchak and Dana Bennet, a union stewart (sic). After hearing evidence and testimony, the Board issued a decision that stated simply that the "case is

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[4]Wallace testified that he was involved in the negotiations of the Transition Letter and that the March 9th decision was contrary to the intent of the Letter of Transition. (Wallace depo. at p. 85). Konietzko testified that he was not in concurrence with the decision. (Konietzko depo. at p. 33).

referred back to a joint company-union committee for resolution."[5] Konietzko testified that the Board was not deadlocked. (Id. at p. 58). However, unlike the prior Board decision, the reasons for the referral were never put into writing or made public.[6]

The Board then appointed a "joint company-union committee." Konietzko and Wallace testified that they, Ferchak and Miller named First Officer Randy Safewright, First Officer Jim Yonts, Second Officer John Hallin and First Officer Ken Dills to the committee.[7] Safewright and Yonts had presented grievances at the June Board meeting and Hallin and Dills had argued at the February Board meeting.[8] Wallace testified that "[the committee's] charge was to resolve the conflict through negotiation." (Wallace depo. at p. 125). Wallace also testified, "the decision of the committee was given back to the company and union, not to the system board." The substance of the committee's

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[5]Introduced into evidence were four letters from Local 608 representatives who negotiated the Transition Letter with UPS. The letters stated that the March decision was inconsistent with the Union's intent in negotiating the Transition Letter and that UPS' original seniority list accurately reflected the Union's intent. One of the letters was written by Green who had presented evidence at the February Board meeting in favor of the February grievants. See Ferchak depo. at pp. 52 and 40, UPS Exh. 11.

[6]Ferchak testified that he didn't think there was proper evidence before the board to reverse the March decision. (Ferchak depo. at p. 43)

[7]Ferchak testified, however, that the decision of who would be on the committee was decided by "the people themselves." (Ferchak depo. at p. 57). Wallace testified that Dills declined to participate. (Wallace depo. at p. 124).

[8]Konietzko testified that the reference in the June Board decision to a "joint company-union committee" meant that the seniority dispute was referred back to the parties for resolution. (Konietzko dep. at p. 53)

decision was included in an (sic) separate document entitled Agreement on Development of Seniority List (Agreement). The Agreement was signed by Ferchak and Konietzko and provided:

> All crewmembers hired by the Company in 1988 who were previously working for a company contractor ... and who were hired by the contractor prior to September 1, 1987, and successfully completed all phases of ground school relative to the seat position held prior to September 1, 1987, regardless of date of IOE completion, shall be placed in Group I; followed by all crewmembers hired by the company in 1988 who were previously working for a company contractor ... and who were hired by the Contractor on or after September 1, 1987, and those who had not yet successfully completed all phases of ground school relative to the seat position.[9]

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[9]Wallace testified that he had input into the company's decision to accept the committee's decision and that he agreed with the decision, but that the decision was not the interpretation of Article 4 as he understood it to be during negotiations of the transition letter nor was it the same position he held when he explained seniority status to newly hired UPS employees. (Wallace dep. at p. 133).

Ferchak testified that he signed the Agreement based on the committee's "recommendation" and "verbal evidence" presented by the committee. (Ferchak depo. at pp 69-70). There is no record of verbal evidence. Ferchak also testified that at the time of the February Board meeting, he had "no clear position" on the matter, but that he had a clear position in August. (Id. at p. 86). Konietzko also characterized the committee's decision as a recommendation. (Konietzko depo. at p. 75).

The seniority list was adjusted on August 2, 1989 to reflect the Agreement. The Agreement required those crewmembers hired by UPS in an upgraded status to be in Group IA, unless they had completed their ground school training for the upgraded position prior to September 1, 1987. Plaintiffs had been hired in an upgraded status, but had not completed ground school training for the upgraded position prior to September 1, 1987 and their seniority was adjusted to reflect a Group IA status.[10] (Grahn depo. at p. 6; Gallagher depo. at p. 5; Dabe depo. at p. 5; Cooper depo. at p. 4, and Edwards depo. at p. 6).

Except for Dabe, the plaintiffs filed grievances requesting that the February Board decision remain controlling and the Agreement be voided. Grahn's grievance was denied by the UPS and the Union. He alleges that the Union has denied "any meaningful appeal" and plaintiffs allege that the Union has refused to process their grievances. (UPS ex. 26, 31, 33; Union ex. 1-4 and Grahn pp 100-104).

Plaintiffs allege that they were arbitrarily removed from their rightful seniority positions by UPS' breach of the CBA and by the defendant Unions' breach of duty of fair representation and they assert jurisdiction pursuant to the Railway Labor Act, Title 45 U.S.C. Sections 151 et seq. (hereinafter referred to as the RLA).[11] Plaintiffs also allege

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[10]By August 2nd, Grahn and Edwards had been awarded captain bids. Upon release of the Agreement, Grahn was removed from the "upgrade program" after completing two and one-half weeks of the three and one-half week captain ground school.

[11]The District Court does not have jurisdiction over disputes involving "the interpretation or application of agreements concerning rates of pay, rules or working conditions,....." Title 45 U.S.C. § 153 First (i) (1970).

that the defendants conspired to change the CBA and Transition Letter to the detriment and injury of the plaintiffs.

The record shows that the final disposition of the grievance heard in June by the Board was not accomplished by a Board decision in the manner contemplated in Article 17(E) of the Supplemental Agreement. There is no record that the committee ever returned to the Board to argue or to support its recommendation, but rather the evidence suggests that the committee submitted the recommendation directly to the union and the company.[12] It does not appear that any formal request to negotiate such an agreement was made by either signatory or that the procedures mandated by the Railway Labor Act, Section 156 for changing collective bargaining agreements were followed in its adoption.

The RLA was enacted for the purpose of promoting stable labor-management relations in the railroad industry. Air Line Pilots Association, Int'l v. Eastern Air Lines, 701 F.Supp. 865, 872 (D.D.C. 1988). With the exception of Section 3, Title 45 U.S.C. Section 153 which established the National Railroad Adjustment Board, Congress extended the RLA in 1936 to cover the air transportation industry. Title 45 U.S.C. § 185; International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682, 685, 83 S. Ct. 958, 10 L.Ed.2d 67 (1963). Under the RLA, employers and unions involved in the air transportation industry are required to establish, generally in their collective bargaining agreements or side agreements accompanying the collective bargaining agreement, system, group or regional boards of adjustment composed of members selected by the air carriers and by the

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[12]There is no written record of the Board's consideration of the recommendation as required in Article 17(M) of the Supplemental Agreement.

employees' representatives. Id., at 686, 83 S. Ct. 959; Baylis v. Mariott Corp., 843 F.2d 658, 662 (1st Cir. 1988); Title 45 U.S.C. §§ 153, 184-185. Adjustment boards have jurisdiction over "minor" disputes which "grow[] out" of grievances or the "interpretation or application of agreements concerning rates of pay, rules, or working conditions..." and the decisions of the boards are final and binding upon the parties involved in the dispute. 45 U.S.C. §§ 183, 184; Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886 (1945). The jurisdiction of the defendant Unions' Board is set forth in Article 17, Section C as follows:

> 1. The Board shall have jurisdiction over all disputes growing out of grievances or out of the interpretation or application of any of the terms of this Agreement or amendments thereto. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by this or other existing agreements between the parties hereto.
>
> 2. The Board shall consider any dispute properly submitted to it when such dispute has not been previously settled in accordance with the provisions of Article 16.

It is undisputed that the proceedings and decision of the February Board conformed with Article 16 and therefore the Board which convened in June did not have the authority to settle the dispute before it. Section C establishes that a Board decision is "final and binding" only as to subsequent

Board decisions, not to agreements between the Union and the Company. The issue to be resolved in the motions for summary judgment is not whether the Board had the power to reconsider a "final and binding decision," Ozark Air Lines, Inc. v. National Mediation Board, 797 F.2d 557 (8th Cir. 1986); Air Line Pilots Ass'n v. Northwest Airlines, Inc., 498 F.Supp. 613 (D. Minn. 1980), but whether company and union representatives were authorized to create a "side agreement" purporting to interpret a provision of the Supplemental Agreement resolved previously by a Board Ruling.

Konietzko testified that local unions typically enter into side letters of agreement to settle differences otherwise unresolved by the CBA. He testified that "generally and historically our side letters of agreement get incorporated into the next contract" and that the letter of agreement is submitted to the national negotiating committee during the next master contract negotiation. Konietzko depo. at pp. 95 and 96. However, there is no other evidence in the record to support the view that Local 608 had apparent authority to vary the CBA with side agreements. See Moreau v. Local Union No. 247, 851 F.2d 516 (1st Cir. 1986)("An agreement entered into by a union representative with apparent authority to bind the union is valid and binding even if actual authority, such as through membership ratification is lacking", Id. citing Moreau v. James River-Otis, 767 F.2d 6, 9 (1st Cir. 1985)). Plaintiffs have not specifically addressed the issue of apparent authority, arguing instead that Article 2, Section of the CBA forbids such agreements.

> Article 2, Section 2 - Riders
> No new Supplements, Riders or Addenda to this Agreement shall be negotiated by any of

> the parties hereto, unless otherwise agreed to by the Employer and the National Negotiating Committee. Any Supplement, Rider or Addendum not agreed to by the National Negotiating Committee will be null and void.

This Court suggests that the provision is subject to either interpretation. Under plaintiffs' theory, the Company and Union could never enter into a side agreement unless it was first agreed to by the National Negotiating Committee. Under the defendants' theory, a side agreement could be entered into and then, if unsatisfactory to the National Negotiating Committee, subsequently voided at the negotiation of the CBA.

The motions of the parties for summary judgment will be held in abeyance. The defendant Local 608, or any other defendant, will be granted sixty days in which to brief and submit to the Court any memoranda or evidence regarding apparent authority. At the expiration of that time, the Court will review the supplemental pleadings. If no party wishes to enter additional pleadings, the Court will order the defendants to submit the question of the interpretation of Article 2, Section 2 to the National Grievance Committee for resolution. See Article 8 of the CBA outlining the procedures for submission.

IT IS SO ORDERED this 18th day of June, 1991.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Chief Judge, U. S. District Court

FEDERAL RULES OF CIVIL PROCEDURE

RULE 56. SUMMARY JUDGMENT

(c) **Motions and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse

party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

Supreme Court, U.S.
FILED
MAY 3 1993
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No. 92-1573

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

VICTOR G. GRAHN, et al. - - - Petitioners,

versus

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Airline Division, Local 608, et al. - - - - - Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF UNITED PARCEL SERVICE CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF UNITED PARCEL SERVICE CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

United Parcel Service Co. ("UPS Co.") is an airline carrier.[1] Its primary business is the air transportation of express packages. Prior to August, 1987, UPS Co.

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[1]Pursuant to Supreme Court Rule 29.1, United Parcel Service Co. is a wholly-owned subsidiary of United Parcel Service of America, Inc. Neither of the companies are publicly traded.

subcontracted with a number of different air carriers for the transportation of these express packages. (J.A. 958-59). These subcontractors actually flew aircraft owned by UPS Co. On August 24, 1987, UPS Co. announced that it was going to assume operational control of its aircraft. Preliminary to this, UPS Co. purchased International Parcel Express, Inc. ("IPX"), one of the former subcontractors. (J.A. 963).

After purchasing IPX, UPS Co. recognized the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL/CIO ("Teamsters") as the collective bargaining representative for the twenty-five former IPX crewmembers and future new crewmembers.[2] Teamsters Local 608 was later recognized as the representative of UPS Co.'s aircraft mechanics.[3] (J.A. 963-64).

In October, 1987, UPS Co. and Teamsters Local 608 commenced negotiations for a collective bargaining agreement covering crewmembers. These negotiations lasted over three months. (J.A. 961, 965). One topic of discussion, involving a number of proposals and counterproposals, was how UPS Co. would develop the initial seniority list for the new crewmembers. Eventually, the parties reached agreement. The terms of the agreement were embodied in a document entitled "Transition of Flight Crewmembers" ("Transition Letter"). (J.A. 965, 967-74).

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[2]"Crewmembers" is the term used to refer to the Captains, First Officers, Professional Flight Engineers and Second Officers employed by UPS Co. to operate its aircraft.

[3]Teamsters Local 608 is used throughout the Brief to refer to the collective bargaining agent for UPS Co.'s crewmember group. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (International Teamsters) is, of course, a party but only because Teamsters Local 608 was in trusteeship.

The collective bargaining agreement between UPS Co. and Teamsters Local 608, including the Transition Letter, was ratified on January 4, 1988, and signed by the negotiators.

UPS Co. hired its first flight crewmembers on January 18, 1988. (J.A. 976). The development of a new seniority list for these new-hires, as established by the Transition Letter, was discussed with each new-hire during the application process. Lee Wallace, Manager of UPS Co.'s Flight Operations and one of the negotiators of the contract, explained how the seniority list worked based on his understanding of the parties' mutual intent during negotiations. (J.A. 975, 977-78).

Wallace explained that the Transition Letter was designed to afford "the contract crewmembers who were ultimately employed by United Parcel Service a seniority within status higher than anyone who was to be hired from the outside or who was to be hired in an upgraded position." (J.A. 979). As Wallace further explained, "if an individual held a position at a contract carrier and was subsequently hired by United Parcel Service in a position higher than that, that was an upgraded position." (J.A. 979).

The Transition Letter, in pertinent part, states as follows:

> "It is hereby mutually agreed and understood by and between the parties . . . that appropriate provisions of the Agreement ratified January 4, 1988, be amended from January 4, 1988, to January 1, 1989, unless otherwise provided in this Letter of Agreement, to provide the additions of complete crews to the Crewmembers' Seniority List (those crews transferred with the original Air Certificate), in an orderly manner during the return of aircraft to [UPS] from contractors and the addition of new aircraft to the [UPS] fleet.
>
> During the transition phase outlined above, seniority groups will be established and added to the seniority

> list in Article 4 of said Agreement dated January 4, 1988, beginning with number twenty-five (25).
>
> Seniority will be assigned to crewmembers using the following procedure:
>
> A. Group I shall be former [UPS] contractor crewmembers who were flying for a [UPS] contractor on or after September 1, 1987, and also crewmembers who are acquired as a result of a merger with, or acquisition of, another carrier. *Group I Crewmembers will be hired in position by status and aircraft type.* Group I crewmembers will be positioned on the administrative lists by those hired September 1, 1987, and earlier, arranged by date of birth followed by those hired after September 1, 1987, arranged by date of birth.
>
> As aircraft are released by the contractors, or new and additional aircraft are introduced into service, such *Group I crewmembers who are hired will be placed on the administrative lists by status and birth date. . . .*
>
> * * *
>
> Group II will be crewmembers other than those crewmembers specified in Group I above. *Group II crewmembers will be hired in position by status and aircraft type."* (J.A. 514-15)(Emphasis added).

UPS Co. categorized crewmembers, for purposes of their placement on the initial seniority list, pursuant to the Transition Letter. Specifically, Group I crewmembers were those employed by a former UPS Co. contract carrier before or after September 1, 1987. September 1, 1987 was the determinative date for seniority purposes. Crewmembers hired and working for one of the contract carriers on or before September 1, 1987, were placed in Group I at the top of the seniority list. Those crewmembers hired by a former contract carrier after September 1, 1987, were placed below those hired by a contract carrier on or before September 1, 1987. (J.A. 913, 914-19).

The Transition Letter also called for hiring "in position by status and aircraft type" for Group I crewmembers, and positioned them on the seniority list "by status and birth date." (J.A. 894-97). Certain contract crewmembers were hired by UPS Co. in an upgraded status. For example, they were a Second Officer with the contract carrier prior to September 1, 1987, but hired later by UPS Co. as a First Officer. Many of these crewmembers, including all Plaintiffs but Edwards, had been promoted to the higher position by the former contractor before September 1, 1987, but, as of September 1, 1987, had not completed all the training necessary to be qualified in the new classification. Specifically, these crewmembers had not completed ground school training, simulator training and/or initial operating experience (IOE) for the upgraded position. (J.A. 988). These crewmembers were thus placed in the subgroup of Group I which, for administrative purposes, UPS Co. and Teamsters Local 608 designated as Group IA.

UPS Co.'s interpretation and application of the Transition Letter was consistent with a graph prepared by Teamsters Local 608 demonstrating how the seniority list would be developed. UPS Co. agreed with Teamster Local 608's explanation of the Letter of Transition. The graph was, in fact, used by UPS Co. personnel representatives to explain seniority placement to newly-hired crewmembers. (J.A. 989-90). The graph referred to three separate groups within each of the three flight crew classifications of, in descending order; Captain, First Officer and Second Officer. These groups were:

Group I	Group I—A	Group II
•Crewmembers employed by contractors prior to Sept. 1, 1987	•Crewmembers employed by contractors after Sept. 1, 1987,	•Non-contractor crewmembers hired in position by status & aircraft
•Crewmembers in the event of a merger	•Hired in an upgraded status	•Aligned by date of birth by class:
•Aligned by date of birth	•Aligned by date of birth	

(J.A. 918).

By December 28, 1988, UPS Co. had employed 790 crewmembers. On that date, UPS Co. published its first official seniority list, placing crewmembers on the list in accordance with the terms of the Transition Letter and the intent thereof. (J.A. 993). Plaintiffs in this action were all positioned on the initial seniority list as Group IA First Officers. Their seniority numbers were as follows: Grahn—418, Cooper—421, Dabe—424, Gallagher—431 and Edwards—415.

In January and February, 1989, a number of crewmembers filed letters protesting their placement on the seniority list. Such protests were proper as the contract gives crewmembers thirty days, after their names first appear on the seniority list, to challenge their placement. Among those challenging their seniority placement was Plaintiff Gallagher who, on January 27, 1989, drafted a letter to Lee Wallace, concerning what Gallagher claimed was his "Seniority List Misplacement." (J.A. 770). Gallagher protested his placement in Group IA, as opposed to Group I. (Id.) A total of eighteen crewmembers protested their placement in Group IA. (J.A. 81).

These letters of protest were treated as grievances by Teamsters Local 608 and scheduled for presentation to a four member System Board of Adjustment in February and March, 1989. (J.A. 995-97). Section 184 of Title II of the Railway Labor Act ("RLA"), 45 U.S.C. 151 et seq., requires air carriers and the carrier's employees' representative to establish a System Board of Adjustment to resolve disputes over the interpretation and application of the parties' collective bargaining agreement. UPS Co. and Teamsters Local 608 established such a procedure in their labor contract. The System Board of Adjustment is composed of two levels. The grievances are first heard by a four member System Board composed of two company and two union representatives. If they deadlock on the grievance, the

contract then calls for the parties to select an impartial arbitrator to hear the evidence and break the deadlock.

Following hearings held on February 28; March 1, 2 and 3, 1989, the four member System Board rendered written decisions on March 9, 1989, on the crewmembers' protests that they should be in Group I, rather than IA. Each decision stated:

> "All crewmembers hired by [UPS] in 1988 who were previously working for a [UPS] contractor and who were hired by the contractor prior to September 1, 1987, regardless of IOE completion, shall be placed in Group I; followed by all crewmembers hired by the [UPS] in 1988 who were previously working for a [UPS] contractor and who were hired by the contractor on or after September 1, 1987. There shall be no retroactive compensation." (J.A. 274).

These System Board decisions resulted in the development and publication of a revised seniority list in March, 1989.[4] The revised seniority list moved those crewmembers who had been Group IA into Group I, because they were hired by UPS Co. in a status higher than they held at the carrier as of September 1, 1987. Group IA crewmembers, at this point, consisted solely of those crewmembers who were newly-hired by the contract carrier after September 1, 1987. UPS Co. adjusted the seniority position of all

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[4]The System Board members were Neil Konietzko and Lee Wallace, representing UPS Co., and William Ferchak and Robert Miller, representing the Union. Wallace, as previously mentioned, is UPS Co.'s Manager of Flight Operations. Konietzko was UPS Co.'s Air Region Labor Relations Manager. Ferchak was trustee of Local 608. Miller, who is now President of the Independent Pilots Association, the crewmembers' collective bargaining representative since January 10, 1990, was a crewmember employed by UPS Co. and a Local 608 steward. (J.A. 954, 981, 564, 569, 615).

crewmembers who fell within the scope of the System Board decision, even if a particular crewmember had not filed a grievance. Plaintiffs' positions on the seniority list were changed as follows: 309 Edwards, C.B.L.; 308 Grahn, V.; 316 Cooper, J.; 341 Dabe, R.; and 375 Gallagher, R.D. (J.A. 1025-26).

Almost immediately, grievances were filed by the crewmembers who had lost seniority status as a result of the March 9, 1989 System Board decisions. UPS Co. received a petition, signed by 156 crewmembers, specifically protesting the March 9, 1989 decisions. Attached to the petition were letters from each of the four Teamster Local 608 representatives who negotiated the Transition Letter with UPS Co. (J.A. 574-75, 894, 923, 937). Each letter confirmed that it was both UPS Co.'s and Teamsters Local 608's intent in the Transition Letter, to place in Group IA, those crewmembers hired by UPS Co. from the contract carriers in a status higher than that held with the contractor on September 1, 1987. Illustrative are the comments of Dick Greene, one of the original union negotiators of the Transition Letter of Agreement. He stated the following concerning the effect of the Transition Letter:

> "This meant that those who were hired after September 1, 1987, by a contractor, and those who advanced to a higher status after September 1, 1987, and subsequently hired by UPS, would be placed on the administrative lists below those hired by a contractor before September 1, 1987." (J.A. 934).

Based upon the evidence submitted by the four original Teamster Local 608 negotiators, and the pending grievances, Konietzko and Ferchak agreed to hold a special session of the System Board of Adjustment to hear evidence on the issue. (J.A. 567-68). Ferchak, Wallace and Konietzko were three of the System Board members. Dana Bennett, a line crewmember, was the second union representative

on the Board. Following hearings on the grievances challenging the March 9, 1989 decision, the System Board issued a decision on June 21, to refer the case back to "a joint Company-Union committee for resolution." (J.A. 782).

The individuals who served on the "joint committee", called for by the System Board's June 21, 1989 decision, were selected by UPS Co. and Teamster Local 608. (J.A. 1004). This committee was led by four crewmembers—Randy Safewright, Jim Yonts, John Hallin and Ken Dills. There were two members from each of the "competing camps." Safewright and Yonts represented those crewmembers who believed that crewmembers hired in an upgraded status should be in Group IA. Hallin and Dills represented those crewmembers who believed that the March 9, 1989 System Board decision was correct.[5]

On July 14, 1989, the joint committee provided a recommendation to UPS Co. and Teamsters Local 608 to resolve the Group I—Group IA seniority placement issue. Konietzko and Ferchak approved and signed the recommendation as an agreement between the parties on August 2, 1989. The substance of the recommendation was carried over to the parties' August 2, 1989 Agreement. (J.A. 590-91).

The document was entitled Agreement on Development of Seniority List. It provided:

> "All crewmembers hired by the Company in 1988 who were previously working for a company contractor, i.e. Evergreen, PHH, Interstate or Orion, and who were hired by the contractor prior to September 1, 1987, and successfully completed *all* phases of ground school

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[5]Andy Gulick, Flight Operations Labor Manager, was appointed to the committee for the purpose of providing it with whatever information was available from the Company. (J.A. 584-85).

> relative to the seat position held prior to September 1, 1987, regardless of date of IOE completion, shall be placed in Group I; followed by all crewmembers hired by the company in 1988 who were previously working for a company contractor, i.e. Evergreen, PHH, Interstate and Orion, and who were hired by the contractor on or after September 1, 1987, and those who had not yet successfully completed *all* phases of ground school relative to the seat position." (J.A. 279).

The UPS Co. Crewmember Seniority List was adjusted on August 2, 1989, to reflect the above agreement. The August 2, 1989 Agreement required those crewmember hired by UPS Co. in an upgraded status to be in Group IA, unless they had completed their ground school training for the upgraded position prior to September 1, 1987. (J.A. 851-53). Plaintiffs, who had been hired in an upgraded status, had not completed ground school training for the upgraded position prior to September 1, 1987. (J.A. 787, 728, 687, 1035).

Plaintiffs Gallagher, Edwards, Grahn and Cooper filed several grievances in August and September, 1989, protesting UPS Co.'s and Teamsters Local 608's decision to execute the August 2, 1989 Agreement. (J.A. 945, 946, 947, 948, 786, 1070). In each of the grievances, Plaintiffs attacked UPS Co.'s and Teamsters Local 608's authority to change their seniority status. The grievances were denied by UPS Co. They were not processed beyond the initial steps of the grievance procedure by Teamsters Local 608. (J.A. 858-60). Plaintiff Dabe did not file a grievance subsequent to the August 2, 1989 Agreement. (J.A. 696).

SUMMARY OF ARGUMENT

Supreme Court Rule 10.1 states that certiorari will be granted "only when there are special and important reasons therefor." Petitioners do not identify a single reason, within the meaning of Rule 10.1, that would justify the

granting of certiorari in this case. They claim that the District Court granted summary judgment without addressing the "real question" raised by their complaint. However, the record shows that the District Court considered all of Petitioners claims, determined they were without merit, and granted summary judgment of the entire case, in Respondents' favor. Subsequently, the Sixth Circuit Court of Appeals conducted a de novo review of the District Court's decision and, after full appellate briefing and oral argument by the parties, affirmed the District Court's decision per curiam. A total of four federal court judges have considered Petitioners evidence and legal argument and found them insufficient to preclude summary judgment. Petitioners are attempting to obtain a third review of the record evidence, which is not a proper justification for granting certiorari.

ARGUMENT

The Petition Should Be Denied Because Petitioners Can Show No Special Or Important Reason For Granting Certiorari As Required By Supreme Court Rule 10.1.

Petitioners pose three questions for review. Each concerns the propriety of the District Court's decision to grant summary judgment in this case and the Sixth Circuit Court of Appeal's affirmance of that decision. The questions presented for review are whether:

(1) the lower courts erred as a matter of law in holding that Respondents did not violate the Railway Labor Act ("RLA"), 45 U.S.C. Sections 152 Seventh and 156, by changing terms and conditions of employment contrary to the RLA and the existing collective bargaining agreement;

(2) the lower courts erred as a matter of law in holding that UPS Co. and Teamsters Local 608 were authorized to execute a "side agreement" without

considering whether the procedures utilized by the Respondents violated the RLA, the existing collective bargaining agreement and the Union's duty of fair representation; and

(3) the Sixth Circuit Court of Appeals failed to apply the correct standard of review. (Petition, pages i, ii and iii).

Supreme Court Rule 10.1 sets forth those considerations which govern the granting of certiorari. Initially, the Rule provides that certiorari "will be granted only when there are special and important reasons therefor." Rule 10.1(a) through (c) further expands upon the type of reasons which will justify the granting of certiorari. They include, for example, a decisional conflict between two Circuit Court of Appeals, a decisional conflict between a state court of last resort and a federal court of appeals, or a case involving "an important question of federal law which has not been, but should be, settled" by the Supreme Court. Petitioners do not identify a single reason, within the meaning of Rule 10.1, justifying a grant of certiorari in this case.

Petitioners' arguments in support of their Petition for Certiorari are insubstantial and represent nothing more than their disagreement with the lower courts' analysis of this case. Petitioners complain that the District Court granted summary judgment for Respondents without addressing the "real question" raised by their Complaint, whether Teamsters Local 608 breached its duty of fair representation. They claim that there were genuine issues of material fact concerning whether Teamsters Local 608 breached its duty of fair representation. They also claim that the Sixth Circuit Court of Appeals applied an incorrect "standard in reviewing the District Court's grant of summary judgment." Petitioners' arguments are simply without merit.

First, the District Court granted summary judgment of the entire case. Assuming that the District Court did not specifically address in its Memorandum Opinion every conceivable issue raised by Petitioners' Complaint, it was not required to do so under Rule 52(a) of the Federal Rules of Civil Procedure ("FRCP"). That Rule states:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule."

Accordingly, the District Court's failure to specifically address in its Memorandum Opinion each contention raised by Petitioners does not mean that the Court did not consider and reject their claims.

Furthermore, Petitioners' contention that the District Court did not consider their claims is simply not supported by the record. The District Court's two Memorandum Opinions, dated June 18, 1991 and January 24, 1992, reflect that the Court was fully aware of and considered their claims. The January 24, 1992 Memorandum Opinion specifically states: "Plaintiffs assert that defendants breached the collective bargaining agreement and the duty of fair representation by entering into a written side agreement . . . ." The District Court concluded it's Memorandum Opinion by holding "Plaintiffs' allegations' (sic) are not sufficient to withstand the defendants' motion for summary judgment." (Petition Appendix, p. 7a). Clearly, the District Court considered and found Petitioners' claims deficient.

Petitioners try to make it appear that the District Court misperceived the "real question" in this case by focusing on whether Teamsters Local 608 had apparent authority to execute the August 2, 1989 Agreement. This issue was neither immaterial nor improperly raised by the District Court as Petitioners suggest. In fact, Petitioners raised

the issue themselves by arguing that the following provision in the labor contract precluded the parties from negotiating the August 2, 1989 Agreement:

> "No new Supplements, Riders or Addenda to this Agreement shall be negotiated by any of the parties hereto, unless otherwise agreed to by the Employer and the National Negotiating Committee. Any Supplement, Rider or Addendum not agreed to by the National Negotiating Committee will be null and void." (J.A. 250).

Petitioners argued in their initial Motion For Summary Judgment that the above contractual language invalidated the August 2, 1989 Agreement between UPS Co. and Teamsters Local 608 since it was not approved by the National Negotiating Committee. (J.A. 259). UPS Co. responded to this argument by asserting that Teamsters Local 608 had apparent or actual authority to negotiate the August 2, 1989 Agreement, despite the above-quoted contract language. (J.A. 319-22). It is not surprising that the District Court decided to address the issue. Indeed, Petitioners would probably have complained if the District Court had not addressed the issue.

Petitioners' argument that the District Court and the Sixth Circuit Court of Appeals erred in granting and affirming summary judgment because there were genuine issues of material fact, is also without merit. The alleged genuine issues of material fact are neither material nor supported by record evidence. Indeed, Petitioners themselves moved for summary judgment arguing that there were no genuine issues of material fact.

More significantly, Petitioners are precluded from arguing on appeal that there are genuine issues of material fact precluding summary judgment. Petitioners, in response to UPS's Motion for Summary Judgment in District Court, did not argue that there were genuine issues of material

fact. (J.A. 420). If Petitioners had believed that there were genuine issues of material fact precluding summary judgment from being entered against them, they had the obligation under FRCP 56(c) to bring those facts to the District Court's attention. Having failed to do so, they are precluded from arguing that the District Court erred on this basis.

It is also significant that every issue which the District Court supposedly ignored was presented by Petitioners to the Sixth Circuit Court of Appeals through an appeal of the District Court's judgment. The Sixth Circuit Court of Appeals' review of the decision to grant summary judgment was de novo. See, *Goodman* v. *Mead, Johnson & Co.*, 534 F.2d 566 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). The Sixth Circuit Court of Appeals, after full appellate briefing and oral arguments by the parties, held, in a per curiam decision:

> "Having carefully reviewed the record and the issues presented in the appellate briefs and the arguments of counsel, we find no error warranting reversal." (Petition Appendix, p. 3a).

There is no basis for concluding or even arguing that the Sixth Circuit Court of Appeals did not review and consider the issues raised by Petitioners. The Sixth Circuit stated that it reviewed Petitioners' claims. Petitioners, however, contend that there is an issue as to whether the appellate court "did or did not apply the correct standard in reviewing the District Court's grant of summary judgment." However, Petitioners do not in any way indicate how the Sixth Circuit Court of Appeals applied an incorrect standard of review. Rather, Petitioners have shown nothing more than that they disagree with the Sixth Circuit Court of Appeals' decision.

Despite all of Petitioners' arguments as to how the lower courts ignored the "real question" in this case, it is clear

that summary judgment was appropriate in this case. Petitioners' arguments concerning the merits of their claims demonstrate the appropriateness of the summary judgment by the District Court.

First, Petitioners claimed that UPS Co. and Teamsters Local 608 violated Sections 156 and 152 Seventh of the RLA with regard to the procedures utilized to effect a change in the collective bargaining agreement. All legal precedent clearly establishes that the procedural requirements of Sections 152 Seventh and 156 may be expressly or impliedly waived by the parties to the contract. See, *Railway Labor Executives Assn.* v. *Boston & Maine Corp.*, 664 F.Supp. 605 (D.C. Maine 1987); *Childers* v. *Brotherhood of Railroad Trainmen*, 192 F.2d 956 (8th Cir. 1951) and *Napier* v. *System Federation*, 127 F.Supp. 874 (W.D. Ky. 1955).

With respect to Teamster Local 608's alleged breach of its duty of fair representation, Petitioners have presented nothing more than conclusory allegations that the Union acted arbitrarily, discriminatorily or in bad faith. Petitioners provided no evidence which would create even an inference that local 608's conduct was "so far outside a 'wide range of reasonableness' [citations omitted] that it was wholly 'irrational' or 'arbitrary'." *Air Line Pilots Association* v. *O'Neile*, _____ U.S. _____, 111 S.Ct. 1127, 1136 (1991).

Teamsters Local 608's actions were indeed completely reasonable. The August 2, 1989 Agreement was a classic compromise between two competing groups of employees who had diametrically opposed interests and viewpoints. One group believed the Transition Letter required crewmembers hired by UPS Co. in an upgraded status to be placed in Group IA. The other group of crewmembers believed that the Transition Letter imposed no such requirement. Teamsters Local 608 acted reasonably in call-

ing a System Board to hear the evidence presented by those crewmembers who disagreed with the March 9, 1989 System Board. Furthermore, it was reasonable for Teamsters Local 608 to allow representatives of the two competing pilot groups to recommend a resolution of the conflict.

There is simply no evidence that Teamsters Local 608 acted arbitrarily, discriminatorily or in bad faith. Accordingly, it is not surprising that the District Court granted summary judgment on this claim or that the Sixth Circuit Court of Appeals affirmed the dismissal.

Petitioners' contention that the contract was not followed, since the System Board did not have the authority to reconsider its prior decision or refer the matter back to the parties for resolution, has been a red herring pursued by them since the beginning of this case. The August 2, 1989 Agreement was a negotiated agreement between UPS Co. and Teamsters Local 608. It was not a decision by the System Board of Adjustment. The District Court realized as much when it held that the "issue to be resolved in the motions for summary judgment is not whether the Board had the power to reconsider a 'final and binding decision' [citations omitted] . . . but whether the company and union representatives were authorized to create a side agreement . . . ." (Petition Appendix, p. 20a).

Supreme Court Rule 10.1 provides that certiorari will be granted "when there are special and important reasons therefor." This Petition for Certiorari presents no 'special and important reasons' justifying the grant of certiorari. A total of four federal court judges have considered Petitioners' evidence and legal arguments and found them insufficient to preclude summary judgment. Petitioners are simply attempting to obtain a third bite of the apple with this Petition for Certiorari. Providing a third review of the sufficiency of the evidence of record is not a proper justification for the grant of certiorari.

CONCLUSION

In light of the foregoing, United Parcel Service Co. requests that this petition be denied.

Respectfully submitted,

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